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The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence

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THE path of sex discrimination law, as it has been shaped by the United States Supreme Court,[1] provides an enlightening glimpse into the workings of the American legal system and the nature of its commitment to equal rights for women and men. The notion of "Equal Justice Under Law"[2] is an important promise of our legal order. This message of equality is so fundamental to American jurisprudence that a guarantee of "equal protection of the laws" was incorporated into the United States Constitution as part of the fourteenth amendment.[3]

The ideology of equality is an integral part of this judicial sys-

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[1] This Article is limited to United States Supreme Court cases litigated on constitutional, rather than statutory, grounds. An analysis similar to the one presented here could be made of lower court cases, or of discrimination cases decided on statutory grounds. That task, however, is beyond the scope of this Article.

[2] This language is sculpted as a legend above the entrance to the Supreme Court building. For an interesting discussion arguing that "Equal Justice Under Law" is a bankrupt idea, see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). *See also* Burton, *Comment On "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982).

[3] The fourteenth amendment provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The notion of equal protection of the laws has also been held to be protected from denial by the federal government under the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497, 500 (1954). *See also* Frontiero v. Richardson, 411 U.S. 677 (1973).

tem. It is an ideology that perpetuates the myth that ours is a classless society in which all citizens function as equivalent members, and where social rewards are dispensed for merit alone.[4] Realistically, of course, our social system does not operate in that manner. Despite the rhetoric of equality, gender determines much about the role an individual in this society will be permitted to play.[5]

The fourteenth amendment's vision of equality of rights is to ensure full participation in the social scheme to all citizens. The benefits of such participation, including access to education, employment opportunity, recreational opportunity, and general control over one's own life, have been denied to women as a group within the patriarchal framework of our culture. The Supreme Court's present "equality" analysis is masking the existing distribution of societal benefits which denies full participation to women. Nothing emerges from the cases which articulates clearly that sex discrimination must be combated in order to foster the empowerment of women as full social participants.

The Supreme Court sex discrimination cases have purported to be concerned with achieving equality between women and men, but in fact the precedents legitimize sex discriminatory attitudes and behavior. The jurisprudential classification of cases, the methods of analysis and, in many instances, the holdings of the cases themselves reinforce the notion that gender determines one's appropriate social role. The evolving Supreme Court jurisprudence presents a confused double message: Sex discrimination is not allowed, unless ending it means changing anything. The troubling result of this dichotomy is to perpetuate sex discrimination, resulting in diminishment of women's power in society.

Two principal forces have led to this jurisprudence. First, certain discriminatory behaviors have not been understood by the Court to implicate issues of sex discrimination. Instead, these cases have been analyzed in terms of constitutional doctrines unrelated to equal protection, without acknowledging the relation-

[4] For an excellent discussion of these ideas, see Lawrence, *"Justice" or "Just Us": Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983). *See also* Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977).

[5] Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 584-85 (1977). Other factors besides gender—for example, social class and race—are also major factors which determine permissible social roles. This essay, however, will focus on sex roles.

ship these cases have to sex discrimination. As a result, the sex discrimination aspect of the questions presented have not been considered seriously, and the sexual stereotypes continue unchallenged. This process can clearly be seen in the recent abortion decisions, which address the constitutional right to privacy without ever considering the rights at stake in terms of sex discrimination.[6]

Second, even when gender-based classifications have been seen as raising a discrimination issue and have been argued and analyzed in terms of equal protection, the equal protection vocabulary has developed in such a way as to maintain the discriminatory status quo. The continuing use of the traditional "comparison mode" of analysis—that is, comparing women to men as the starting point of equal protection review—has made the development of a real end to sex discrimination impossible.

This essay examines the multiple problems which have arisen as a result of the use of this comparison mode of analysis. Any analysis that requires comparing women to men establishes men as the normative model. This prioritization of maleness inherently disadvantages women. Further, the comparison format emphasizes individuals rather than focusing attention on women as a group and ignores the diminishment of women's collective power that is perpetuated by sex discrimination.

The current equal protection analysis, which stresses the comparison of women to men, often tolerates conduct that is, in fact, discriminatory.[7] For example, treating a woman differently and disadvantageously on account of pregnancy has not been viewed by the Court as sex discrimination violative of the fourteenth amendment.[8]

Another fundamental problem with the comparison mode is its requirement that those groups being compared be "similarly situated."[9] This is impossible in our society. In our society blacks are not similarly situated to whites, nor are women similarly situated to men. Both blacks and women have experienced centuries of discrimination, and the effects of that experience are still present. In this culture, the social reality of women is quite different from

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[6] *See infra* text accompanying notes 186-98.

[7] *See infra* text accompanying notes 113-54.

[8] Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974). *See also infra* text accompanying notes 75-76.

[9] *See infra* text accompanying notes 131-45.

that of men.[10] If people have been treated differently in society they will appear in dissimilar positions when they are compared. Therefore, they cannot be similarly situated for purposes of equal protection review. To the extent that being similarly situated is a prerequisite for constitutional scrutiny of differential treatment, any such comparison will necessarily result in continued disparate treatment and discrimination.

Finally, litigants have been forced to describe the harm resulting from the discriminatory action in such a way as to fit into the framework of accepted equal protection vocabulary, thus distorting the claim. Most lawyers have equated the protection offered women by the equal protection clause with a protection from discrimination as described by the conventional comparison mode.[11] Equating equal protection with discrimination in this way has hampered women's ability to achieve equal protection of the laws. The Supreme Court decisions have looked at how women have been treated in relation to how men have been treated, rather than looking at the treatment of women generally. Thus, actions that discriminate against both women and men are not found to be violative of the equal protection clause.

The essential premise of this Article is simple. Any stigmatizing conduct which inhibits the full participation of women in society should be found unconstitutional under the equal protection clause. Action by government[12] need not be discriminatory in a

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[10] B. BABCOCK, A. FREEDMAN, E. NORTON, S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES (1975) [hereinafter cited as B. BABCOCK]; H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (2d ed. 1981); Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A.L. REV. 435 (1981). *See also* D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980).

[11] *See* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) ("When asked what the Equal Protection Clause means, an informed lawyer . . . does not repeat the words of the Clause—a denial of equal protection. Instead, he [sic] is likely to respond that the Clause prohibits discrimination.").

[12] The wording of the fourteenth amendment provides that "No State shall . . . deny . . . the equal protection of the laws." Thus the doctrine of state action necessitates finding state involvement in order to address a violation of the equal protection clause. Important cases on the state action doctrine include: Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (heavily-regulated private utility); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (private club with a state liquor license); Evans v. Newton, 382 U.S. 296 (1966) (privately-donated park controlled and maintained by the state); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (private restaurant in a state building); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of a discriminatory contract). *See* B. BABCOCK, *supra* note 10, at 88-89.

comparative sense to constitute a violation.[13] Women, who should be full participants in society, need not be treated differently than men in order to offend judicial notions of equal protection. Different treatment, measured by the comparison mode, is only one form of conduct which hampers full participation. Any treatment which stigmatizes women or restricts their choice of social role, particularly that which would necessarily confine women to the private sphere, is offensive to the achievement of equal protection.

The vision of "equality of rights," as the fourteenth amendment language states, must be maintained. If a particular treatment abridges the equal protection of the laws in terms of the ultimate attainment of full participation in society, then that treatment violates the fourteenth amendment. Hence, the comparison mode of equal protection theory is not useful. Instead, the equality of rights approach as embodied in the "participatory perspective"[14] is a more appropriate jurisprudential model for deciding challenges which allege that a particular statute is violative of equal protection.

Part I of this Article examines the evolution of the comparison mode of equal protection review. Part II surveys the history of sex discrimination law in the Supreme Court through the 1975 term. Part III, scrutinizing the post-1975 equal protection cases which have upheld sex discriminatory classifications, and Part IV, describing the post-1975 equal protection cases which have struck sex discriminatory classifications, illustrate how these two lines of cases have both legitimized sex discrimination by the language of the opinions and by the Court's use of the comparative mode of equal protection review. The cases described in Part V, which are sex discrimination cases in fact, but which have been analyzed on other grounds, have also legitimized sex discriminatory attitudes. Finally, Part VI discusses the participatory perspective mode of analysis for equal protection review.

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[13] Fiss, *supra* note 11, at 158 ("Discrimination, arbitrary or otherwise, is only one form—one form among many—of conduct that disadvantages a group. There may be group-disadvantaging conduct that is not discriminatory. This would be true of state conduct that seemed beyond the reach of the Equal Protection Clause . . . .").

[14] *See infra* text of Part VI. I am indebted to Professor Kathryn Powers for the phrase "participatory perspective." *See* Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 102 (1979).

I

THE EVOLUTION OF THE COMPARISON MODE OF EQUAL PROTECTION REVIEW

The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[15] Although this clause was written into the Constitution with the passage of the fourteenth amendment, legal arguments based on equal protection theory were not successfully utilized early in the history of the fourteenth amendment. Justice Oliver Wendell Holmes wrote in 1927 that the equal protection clause was the "last resort" of constitutional argument.[16]

In 1949 Tussman and tenBroek wrote their very influential article on the meaning of the equal protection clause.[17] This article influenced the development of the current comparison mode of equality analysis. Tussman and tenBroek introduced a new vocabulary into equal protection jurisprudence, asking whether a complainant was "similarly situated with respect to the purpose of the law"[18] to other individuals. Depending on how the question was answered the authors then described legislative classifications as reasonable, unreasonable, overinclusive, underinclusive, or both.[19] Thus, the notion of comparing the complainant to others with respect to the purpose of the law was implicit in the Tussman-tenBroek view of equal protection.

The comparison mode of analyzing equal protection challenges to statutes is certainly a familiar one. The equal protection clause was applied to cases involving unequal treatment on account of race,[20] national origin,[21] and alienage[22] prior to its relatively re-

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[15] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[16] Buck v. Bell, 274 U.S. 200, 208 (1927).

[17] Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

[18] *Id.* at 346.

[19] *Id.* at 346-53.

[20] *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Watson v. City of Memphis, 373 U.S. 526 (1963).

[21] *E.g.*, Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

[22] *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

cent application to gender. In each of these situations, an individual showed that a law perpetuated disparate treatment in violation of the Constitution by comparing the treatment of the individual to treatment received by those in another social group. For example, a Mexican-American excluded from juries complained that whites were not similarly excluded.[23] A woman barred from the practice of law claimed that men could practice law and, therefore, she should be admitted to practice.[24] A black excluded from a public swimming pool complained that whites were allowed to swim.[25]

Race discrimination has served as the prototype for equal protection litigation. Treatment of blacks in a particular context was compared to treatment of whites in the same context in order to determine if equal treatment was being received by members of both groups. Where blacks were dealt with dissimilarly because of race, the practice was held to be in violation of the constitutional guarantee of equal protection of the laws. This practice of measuring equal treatment by comparing members of a group discriminated against to a mainstream group has been raised to a jurisprudential model for all equal protection analysis.

The comparison mode of equal protection review is not mandated by constitutional language. While much has been written about the framers' intent in enacting the fourteenth amendment,[26] it can hardly be said that there is a consensus of interpretation.[27] To be sure, there is no more specific support for the comparison mode of analysis, as put forth by Tussman and tenBroek,[28] than there is for some other approach to equal protection theory.[29]

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[23] Hernandez v. Texas, 347 U.S. 475 (1954).

[24] Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873).

[25] Palmer v. Thompson, 403 U.S. 217 (1971).

[26] *See, e.g.*, H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); J. TENBROEK, EQUAL UNDER LAW (1965); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

[27] *See* Fiss, *supra* note 11, at 118-19.

[28] *Id.* at 132.

[29] Several scholars have described alternative modes of equal protection review. Owen Fiss has compared the existing methodology, which he terms the "anti-discrimination principle," with a "group disadvantaging principle." Fiss, *supra* note 11. Catherine MacKinnon prefers an "equality approach" to the present approach, which she terms a "differences approach." C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). Alan Freeman has described equal protection arguments in terms of a "victim" versus "perpetrator perspective." Freeman, *Legitimizing Racial*

Yet, the comparison format dominates equal protection review. Sex discrimination litigation has been shaped to fit into this comparison mode of analysis, causing serious implications for our ability to perceive and understand the issues presented by the social problem of that discrimination.

II

THE DEVELOPMENT OF SEX DISCRIMINATION LAW THROUGH 1975

The comparison mode of equal protection review was introduced into the body of sex discrimination law in the early 1970's when litigators began to frame their constitutional arguments in a manner parallel to the growing body of equal protection jurisprudence in cases involving race, alienage, and national origin. Since so few sex discrimination cases were decided before the flurry of litigation in the 1970's, it was necessary to develop a vocabulary with which to debate sex discrimination issues. At the time, the decision to use the existing jurisprudential model made strategic sense. Now, however, we must determine whether that choice has led away from the ultimate goals of ending sex discrimination and empowering women as full participants in society.

The following overview of the development of sex discrimination law illustrates how the use of the conventional comparison format in equal protection analysis has not served, and in fact has impeded, these ultimate goals.

Discrimination Through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978).

The notions of a comparison mode, describing the manner in which the Court has assessed the issue of equality of rights, as contrasted to a participatory perspective, which this Article describes as a preferred principle to be used in equal protection review, is indebted to this existing body of scholarship.

There are differences, however. Freeman's language is used to illustrate how Supreme Court jurisprudence has served to legitimate race discrimination rather than to argue for a specific change in equal protection review. While I agree with Fiss that the equal protection clause needs a mediating principle which is different than the one currently being used, I do not believe the current theory is really an anti-discrimination principle, but rather one that perpetuates discrimination. I also disagree with Fiss's idea that women should be entitled to less protection under his proposed group-disadvantaging principle. My principal disagreement with MacKinnon is in her use of the term "equality approach" to describe her preferred analysis. All of these various approaches could be characterized as equality approaches. While the objective of an "equality approach" may be to end discrimination in order to empower women and enable them to participate fully in society, that language of equality is too vague in relation to the goal.

A. The Early Cases

The pre-1970 history of sex discrimination law is short and bleak. Sex discriminatory laws which barred women from the legal profession,[30] from the right to employment as bartenders,[31] from the right to serve on juries,[32] and from the right to vote[33] survived constitutional challenges. In these important areas of employment, public service, and participation in the political process, the Court found that disparate treatment of women was acceptable. Whether citing the law of the creator,[34] recognizing the perceived appropriate place of woman in society,[35] or claiming judicial deference to legislative judgments regarding a woman's role in the work force,[36] the reasoning in these cases displayed clear judicial agreement with the disadvantageous treatment women were receiving.[37]

Laws which provided maximum hours women could work[38] and minimum wages women could earn[39] were also challenged as sex discriminatory. Even though labor statutes such as these

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[30] *See, e.g., In re* Lockwood, 154 U.S. 116 (1894); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873).

[31] Goesaert v. Cleary, 335 U.S. 464 (1948).

[32] Hoyt v. Florida, 368 U.S. 57 (1961).

[33] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

[34] Bradwell v. State, 83 U.S. at 141-42 (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.").

[35] Hoyt v. Florida, 368 U.S. at 61-62. ("Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.").

[36] Goesaert v. Cleary, 335 U.S. at 466 ("Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, . . . [t]his Court is certainly not in a position to gainsay such belief by the Michigan legislature.").

[37] The language of the *Goesaert* majority opinion illustrates the lack of seriousness with which plaintiff's claims were considered. The Court used phrases such as "Beguiling as the subject is," and "the alewife, sprightly and ribald" to refer to the woman plaintiff. 335 U.S. at 465. The Court ignored the real issue of economic freedom for women which was at the root of plaintiff's complaint. *See* B. BABCOCK, *supra* note 10, at 96.

[38] *See* Muller v. Oregon, 208 U.S. 412 (1908); Radice v. New York, 264 U.S. 292 (1924); Bosley v. McLaughlin, 236 U.S. 385 (1915); Miller v. Wilson, 236 U.S. 373 (1915); Riley v. Massachusetts, 232 U.S. 671 (1914).

[39] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

could easily have been drafted in sex-neutral language,[40] the Court was untroubled by the drafters' use of gender-based classifications, explaining that the biological differences between women and men justified the special protection received by women.[41]

Thus, the special social position of women, and the biological differences between men and women emerged in these cases as justifications for sex-based classifications. These classifications clearly disadvantaged women by preventing women from making choices about their own destiny, and by keeping women out of jobs and denying them a meaningful role in the public sphere.

In two early cases, male plaintiffs attempted to invalidate statutes which made gender distinctions "favoring" women. Unsuccessfully, the men argued that they were entitled to the "benefit" that women were given by the laws. In one case, the challenged statute said women did not have to pay a license fee to do hand laundry work.[42] The statute was upheld because, the Court reasoned, a state could put "a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former."[43] In the second case, a statute provided that women did not have to pay a poll tax.[44] This statute was also upheld by the Court because of the "burdens necessarily borne [by women] for the preservation of the race."[45] Woman's "appropriate place" in the social structure (doing laundry is a good job for women) and biological difference (women have babies, so how can they vote?) were considered adequate justifications for sex-based classifications which were damaging to the male plaintiffs. It is important to note, however, that these disadvantages to men as a result of gender classifications were not used to correct any past discrimination against women, but rather

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[40] Labor statutes eventually were drafted to include all workers, with no differentiation by sex. *See* B. BABCOCK, *supra* note 10, at 53.

[41] Muller v. Oregon, 208 U.S. at 422 ("[H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man."). *See also* West Coast Hotel Co. v. Parrish, 300 U.S. at 394 ("It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest."); Miller v. Wilson, 236 U.S. at 382 (referring to the legislature's ability to control women's hours as "the reasonable exertion of protective authority").

[42] Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

[43] *Id.* at 63.

[44] Breedlove v. Suttles, 302 U.S. 277 (1937).

[45] *Id.* at 282.

to perpetuate the notion of woman's special, disadvantageous, place.

The one case in which equal treatment for women was advanced and in which the Court recognized that women should not receive special treatment was a criminal case in which the Court found that a woman and her husband could be charged separately with the crime of conspiracy.[46] The Court wrote that upholding the dismissal of the indictment against the woman defendant "would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties."[47]

These cases set an ideological precedent. While the Court is willing to cite changes in the status of women to uphold a decision which furthers the idea that the criminal law is applied evenly to all citizens, other early decisions illustrate that the Court is just as eager to perpetuate the notion that the home is the appropriate place for women, especially where that ideology is necessary to perpetuate the existing social order.

Two ideas emerge from these early cases: the idea that women have a special, or inferior, role to play in society;[48] and the idea that there is a biological difference between women and men that justifies this special status.[49] These notions were not, of course, created by judges; they were existing societal ideas. Judges, however, used them as justifications for perpetuating sex discrimination.

By the 1970's there was less societal agreement that women had a special, inferior place in society. As more women entered the work force, attitudes that relegated women to the private sphere began to change. Much of the language in the judicial opinions of the 1970's is devoted to emphasizing that women are no longer limited to the home. While no one, of course, disputes that biological differences do exist between women and men—the definitive difference between the sexes is the exclusive ability of women to bear children—confusion about the importance of this difference to the ideology of equality continues to be reflected in the emerging sex discrimination jurisprudence of the 1970's.

Although several of the early cases mentioned above have now

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[46] United States v. Dege, 364 U.S. 51 (1960).

[47] *Id.* at 54.

[48] *See* Hoyt v. Florida, 368 U.S. at 61-62; Goesaert v. Cleary, 335 U.S. at 466; Bradwell v. State, 83 U.S. at 141.

[49] Muller v. Oregon, 208 U.S. at 422.

been disapproved,[50] subsequent sex discrimination cases simply employ a modern version of the old arguments regarding the appropriate place for women in society and regarding the importance of biological differences between men and women. The Supreme Court still avoids addressing the issue of eliminating sex discrimination, and continues to uphold laws that are disadvantageous to women.

B. Contemporary Jurisprudence: The Crystallization of a Standard of Review

The majority of the Supreme Court sex discrimination cases have been decided in the last twelve years.[51] While the lack of extensive litigation in this area prior to the 1970's surely does not mean that the social problem of sex discrimination did not exist, many factors may explain the sudden burst of litigation. For instance, the return of a feminist social movement[52] following the 1960's civil rights movement, and the increase of women in law schools[53] during that same time period must certainly have been important factors in the rise of sex discrimination litigation.

Prior to 1970, sex discrimination cases were not usually taken seriously[54] and were not discussed in terms of gender-based discrimination. A legal vocabulary specific to these issues had not yet been developed. Early litigators bringing sex discrimination cases to the Court argued and sought to have the claims considered in the same manner and with the same vocabulary that had been used in other discrimination cases. An equal protection analysis emerged with an emphasis on comparisons and tests for review. Much of the litigation focused on efforts to convince the Court to apply a "strict scrutiny" standard of review,[55] which was the paradigm used in race cases.

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[50] *Bradwell v. State* was criticized by Justice Brennan in a plurality opinion he wrote for the Court in Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973); *Goesaert v. Cleary* was disapproved in a footnote in Craig v. Boren, 429 U.S. 190, 210 n.23 (1976); *Hoyt v. Florida* was disapproved by Justice Douglas in his concurring opinion to Alexander v. Louisiana, 405 U.S. 625, 641-42 (1972).

[51] This "veritable explosion" of sex discrimination case law development in the Supreme Court was noted in W. WILLIAMS, SUPPLEMENT TO SEX DISCRIMINATION AND THE LAW 5 (1978).

[52] *See* SISTERHOOD IS POWERFUL, xvii-xxxvi (R. Morgan ed. 1970).

[53] *See* C. EPSTEIN, WOMEN IN LAW 5 (1981).

[54] *See, e.g., supra* note 37. *See also supra* text accompanying notes 30-50.

[55] *See infra* text accompanying notes 62-67. For the development of the strict scrutiny standard of review, see *supra* text accompanying notes 16-25.

The most serious problem with this litigious focus on developing a vocabulary in sex discrimination cases to parallel earlier discrimination decisions was that this language, not developed for, nor especially suited to the issues raised by sex discrimination cases, abstracted legal thinking away from the heart of the issues. Litigation was directed towards problems such as the appropriate standards of review. Thus, form, *i.e.*, the struggle over the appropriate standard of review, was elevated over substance, *i.e.*, combating discrimination. The resulting jurisprudence perpetuated the substantive discrimination by failing to address it.

Sex discrimination is so pervasive and occasionally so subtle that people often do not recognize a discriminatory situation when it occurs. The lack of a vocabulary to describe sex discrimination contributes to this problem. What we cannot verbalize, we cannot recognize. The feminst movement in the late 1960's helped to create the vocabulary necessary to discuss the real-life problems of discrimination, including unpaid work in the home, women earning less than men for similar work, and the importance of freedom of choice as to abortion. However, although this vocabulary adequately describes the social issues of sex discrimination as it affects women's lives, it has been distorted when translated into legal language. An examination of the early 1970's sex discrimination cases illustrates how this language of the feminist movement was distorted.

In 1970, in *Reed v. Reed*,[56] the Court struck down a sex-based classification for the first time in its history, holding that the preference in Idaho law for appointment of males as administrators of a decedent's estate could not withstand an equal protection challenge. Much has been written about this opinion,[57] which stated that the Idaho classification could not be upheld because it was based on overbroad and archaic notions about women. The Court wrote, "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and sub-

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[56] 404 U.S. 71 (1971).

[57] *See, e.g.*, Krauskopf, *Sex Discrimination—Another Shibboleth Legally Shattered*, 37 MO. L. REV. 377 (1972); *Supreme Court Report: Women Have Equal Right to Administer Estates*, 58 A.B.A. J. 193 (1972); Note, *The* Reed *Case: The Seed for Equal Protection from Sex-Based Discrimination, or Polite Judicial Hedging?*, 5 AKRON L. REV. 251 (1972); Note, 5 CREIGHTON L. REV. 353 (1972); Note, *Constitutional Law: The Equal Protection Clause and Women's Rights*, 19 LOY. L. REV. 542 (1973); Note, 43 MISS. L.J. 418 (1972); Note, 2 TEX. S. L. REV. 329 (1972); Note, 1972 WIS. L. REV. 626.

stantial relation to the object of the legislation. . . .' "[58] The state law preferred men to women as administrators, according to the state's counsel, because men had more business experience than women.[59] *Reed* is an interesting case because undoubtedly the state's purported rationale was factually true. Men generally have had more business experience than women. Furthermore, it was administratively convenient, as the state argued, to prefer one group over another and to avoid holding individual hearings to qualify administrators in each case.[60] Yet, the Court found these rational bases for the sex-based classification inadequate to warrant upholding the classification. Generalizations about the business experience of men were insufficient because many women could also be capable administrators. Administrative convenience did not outweigh enabling capable women to participate.

The Court's decision implies that prior inexperience will not automatically suffice to keep women out of business or legal work in the future. In addition, administrative convenience will not justify sex-based classifications. The justices were willing to remove their blindfolds and actually see that a problem of sex discrimination existed, and act to eradicate it.

Proponents of equal rights were excited by the *Reed* decision because it suggested that scrutiny of sex-based classifications under the equal protection clause could lead to an end to sex discrimination.[61] The Court seemed to address the real social discrimination that women suffered: the denial of admittance to the public sphere as exemplified by the field of estate administration.

This optimism continued with the decision in *Frontiero v. Richardson*.[62] Although merely a plurality decision, *Frontiero* continued in the path begun in *Reed* by implementing a new judicial perspective on sex-based classifications. In *Frontiero*, the plaintiff challenged provisions of the United States Code[63] that required servicewomen to prove the dependent status of a spouse in order to receive certain benefits. Servicemen were not required to pro-

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[58] Reed v. Reed, 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[59] Brief for Respondent at 12, Reed v. Reed, 404 U.S. 71 (1971).

[60] 404 U.S. at 76.

[61] *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Krauskopf, *supra* note 57.

[62] 411 U.S. 677 (1973).

[63] *Id.* at 678-79.

vide similar proof of spousal dependency. The four justices in the plurality described their analysis as strict scrutiny so that sex discrimination would fit into the existing body of equal protection jurisprudence.[64]

The language of the Court's analysis, however, belied the notion that it was strict scrutiny in the same sense that the phrase has been used in other equal protection cases. The classic phrasing of strict scrutiny required the state to bear the burden of proving the challenged classification was necessary to promote a compelling government objective.[65] Yet the plurality wrote, "The Government offers no concrete evidence . . . tending to support its view that such differential treatment in fact saves the Government any money."[66] The language in the decision raised many questions. What if the government had offered "concrete evidence" that money could be saved? Would saving money justify a sex-based classification? Would "concrete evidence" be equivalent to proof that a sex-based classification was "necessary"?

Many commentators saw *Reed* and *Frontiero* as heralding an important change in the course of Supreme Court doctrine.[67] At first blush they looked like promising decisions that would lead to strict scrutiny of gender-based classifications. It appeared that the Court was building a series of cases that would truly examine the problem of sex discrimination. A close reading of *Frontiero*, however, revealed that the equal protection analysis used by the Court, as it ostensibly sought to expand the comparison mode of equal protection review into the sex discrimination area, would not serve to achieve full participation for women. Furthermore, the stage was being set in other decisions of the Court for a parallel body of sex discrimination case law that would keep intact centuries of discrimination.

Three cases, *Stanley v. Illinois*,[68] *Roe v. Wade*,[69] and *Doe v. Bolton*[70] indicated that the Supreme Court was not handling the issues in a way that would lead to the eradication of sex

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[64] *Id.* at 688. *See supra* text accompanying notes 16-25.

[65] Dunn v. Blumstein, 405 U.S. 330, 342 (1972) ("In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are *'necessary* to promote a *compelling* governmental interest.' " (emphasis in original)) (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).

[66] Frontiero v. Richardson, 411 U.S. at 689.

[67] *See* Gunther, *supra* note 61. *See also supra* note 57.

[68] 405 U.S. 645 (1972).

[69] 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

[70] 410 U.S. 179, *reh'g denied*, 410 U.S. 959 (1973).

discrimination. Although these cases involved important questions concerning the empowerment of and discrimination against women, the Court did not analyze them in terms of equal protection, nor recognize that they involved issues of sex discrimination.

In *Stanley v. Illinois*, decided the same term as *Reed*, the petitioner Peter Stanley had been living intermittently for eighteen years with Joan Stanley, to whom he was not married. They had three children. Under Illinois law, the children of unwed fathers become wards of the state upon the death of the mother. Thus, when Joan Stanley died, the children were declared wards of the state, taken from petitioner, and placed with a guardian. Petitioner appealed, claiming that he had never been shown to be an unfit parent.[71] He also pointed out that under the law an unmarried mother could not have been deprived of her children without a hearing. The Court agreed with petitioner, and held that he was entitled to a hearing on his fitness as a parent before his children could be taken away from him.

Interestingly, the Court did not use the equal protection comparative perspective to analyze this case. Instead, the decision was reached on due process grounds, emphasizing the individual petitioner's right to a hearing. The Court also noted the importance of making individual determinations in the area of family law.[72] It is unclear why the Court refrained from using the proffered equal protection analysis here.[73] The Court must have realized that men could also be discriminated against on account of sex; perhaps the Court was unable to consider seriously the claims of a male in the traditionally female sphere of the family.

The Court's confusion about sex discrimination was further illustrated by the first abortion decisions, *Roe v. Wade* and *Doe v. Bolton*. No single issue is more central to equality for women than the right to autonomy in the areas of childbirth and reproductive freedom. Without such a right, women are not free to participate in any social spheres. Yet the Court failed, or refused, to perceive that *Roe v. Wade* and *Doe v. Bolton* were cases about

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[71] 405 U.S. at 646.

[72] *Id.* at 656-57 ("Procedure by presumption is always . . . easier than individualized determination. But when . . . the procedure forecloses the determinative issues of competence . . . , when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.").

[73] *Id.* at 647; *see also* Brief for Petitioner at 9-36, Stanley v. Illinois, 405 U.S. 645 (1972).

equality and sex discrimination.[74] Instead, the Court reached the decision to strike the state abortion statute in each case on privacy grounds.

The 1973-74 term signaled the death knell for any hope that the Court was promoting sexual equality through an equal protection analysis. The subject of pregnancy and sex discrimination raised by *Geduldig v. Aiello*[75] demonstrated either overwhelming ignorance, or incredible malevolence, by the Court towards the notion of full social participation for women. In a decision that remains impossible to explain to non-lawyers, the Court decided that treating a woman differently and disadvantageously on account of pregnancy was not sex discrimination at all.[76] The very outrageousness of the idea that disadvantageous disparate treatment based on pregnancy is not gender-based illustrates the extent of the insidiousness of the comparison mode of analyzing equal protection cases. Without a pregnant man with whom to compare the treatment of pregnant women, the Court was unable to see, or refused to see, that disadvantageous disparate treatment of women

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[74] Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition, Roe v. Wade, 410 U.S. 113 (1973).

[75] 417 U.S. 484 (1974).

[76] The idea was so unremarkable to the members of the Court that it was relegated to a footnote in the opinion:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Id. at 496-97 n.20.

on account of pregnancy could seriously affect their participation in the paid labor force, as well as in other social spheres.

The sex-based classification challenged in *Kahn v. Shevin*,[77] decided in the same term, involved Florida's decision to provide a property tax exemption for widows, but not widowers. The Court upheld this classification, agreeing with the lower court that the appropriate test was whether the sex-based classification bore a fair and substantial relation to the object of the legislation. The Court identified the object of the legislation as "being the reduction of 'the disparity between the economic capabilities of a man and a woman.' "[78]

Justice Douglas, writing for the majority, commented that "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."[79] This judicial recognition of the existence of a male-dominated culture and its correlative economic impact on women is very unusual. Despite this observation, Justice Douglas later cited *Muller v. Oregon* for the proposition that women are physically different from men,[80] a fact he felt was relevant to questions about where and how women should work.

The idea that women are different, contrasted to the idea that it is men who are different, reflects the very patriarchal culture to which Justice Douglas earlier alluded. It is a male-dominated culture that sets men up as the normative model and women as the deviation, rather than vice versa.

In his dissent, Justice White emphasized the concept of individual treatment without regard to sex.[81] This individual rights notion too easily becomes perverted into another way to benefit men. "[T]he paradox of remedies for sex and race discrimination is that often they must take sex and race into account."[82] To ignore sex,

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[77] 416 U.S. 351 (1974).

[78] *Id.* at 352 (quoting Shevin v. Kahn, 273 So.2d 72 (1973)). The use of the singular form of the nouns "man" and "woman" is interesting here since in fact the Court's reasoning requires one to make sex-based generalizations about men and women as groups. It is also interesting because in the context of this case, which involved tax returns, broad sex-based generalizations would not be necessary. An individual's particular tax return would be readily available to provide information about his or her need for a tax reduction.

[79] *Id.* at 353.

[80] *Id.* at 356 n.10.

[81] *Id.* at 361-62 (White, J., dissenting). For a discussion of the dangers of an individual rights approach, see *infra* text accompanying notes 88-91.

[82] B. BABCOCK, *supra* note 10, at 124.

as Justice White advocates,[83] leads to a perpetuation of the status quo in which women are the victims of discrimination.

In *Cleveland Board of Education v. LaFleur*[84] and its companion case, *Cohen v. Chesterfield County School Board*,[85] sex discrimination on account of pregnancy was also at issue. In these cases, decided several months prior to *Geduldig*, the Court heard a challenge to two school boards' mandatory maternity leave policies. The school districts' policies required pregnant teachers to stop teaching in the fourth or fifth month of pregnancy regardless of time of school year, health of the woman, or her own desires. Although the case was argued in existing sex discrimination equal protection language,[86] the Court struck down the school boards' policies on due process grounds: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[87] The case represented a victory for women in one sense by supporting the idea that the mandatory maternity leave policy was unfair when it took away the pregnant women's right to choose to be pregnant and to continue working. However, by ignoring the equal protection arguments that were part of the case, the Court refused to ground its support for the pregnant women in the equal protection clause. The Court's implicit refusal to recognize that this was an issue of sex discrimination rather than of individual rights undermines the notion of equality. The opinion emphasized the individual rights at stake, stating, "[T]he ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter."[88]

Individual rights are certainly implicated in any decision that forces pregnant women to behave in one way or another, but it is

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[83] 416 U.S. at 361 (White, J., dissenting). Note also the dissent of Justice Brennan, joined by Justice Marshall, in which Justice Brennan advocates a test of "close judicial scrutiny," *id.* at 357, but in fact does not use it. Instead Justice Brennan looks for a "more precisely tailored statute" or use of "less drastic means." *Id.* at 360.

[84] 414 U.S. 632 (1974).

[85] *Id.*

[86] In *LaFleur*, the Court of Appeals for the Sixth Circuit found a violation of the equal protection clause. 414 U.S. at 636. In *Cohen*, the District Court for the Eastern District of Virginia found the school board regulation to be in violation of the equal protection clause, but the Fourth Circuit reversed and upheld the constitutionality of the challenged regulation. *Id.* at 638.

[87] *Id.* at 639-40.

[88] *Id.* at 645.

the invasion of the group right, the prohibition on women who become pregnant as a class of people, that is the violation of equal protection and that offends the equality principle.

One danger in the due process or individual rights approach is exemplified in the case itself where the Court seeks to distinguish from its holding those mandatory leave provisions "requiring a termination of employment at some firm date during the last few weeks of pregnancy."[89] The Court hints that the due process balance shifts as the pregnancy comes closer to term, making the woman's choice to participate in the work force less important.[90] Thus the danger of the due process approach is the diminishment of the importance of the woman's choice.

A parallel reasoning was used by the Court in the abortion cases, where the woman's interest in abortion was held to diminish as the state interest increased.[91] The existing political reality is one where women will not be given an absolute power to decide their fates,[92] whether it be an abortion decision or termination of employment to bear a child. To deny women this control over their fates denies them full social participation.

Schlesinger v. Ballard[93] was the next case decided in the Court's struggle to find an appropriate standard of review in sex discrimination cases. The plaintiff, a male navy officer, complained that he was subjected to mandatory discharge under a statute that allowed women to serve for a longer period of time prior to discharge than men. Applying a rational basis test, the Court found it reasonable for Congress to provide that women be kept longer than men prior to discharge because "male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service."[94] The Court found a justification for the gender-based treatment in the fact that women had fewer opportunities in the military than men. *Schlesinger* is a case that makes no sense. The gender-based classification upheld by the Court does not remedy the fact that women are discrimi-

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[89] *Id.* at 647 n.13.

[90] *Id.*

[91] Roe v. Wade, 410 U.S. 113, 162-63, *reh'g denied*, 410 U.S. 959 (1973).

[92] One can only wonder why women, and not men, have major life choices made for them. Certainly there are constitutional areas, like the right to speech protected by the first amendment, where individual choice decreases as the state interest increases. But such areas burden both women and men equally. This author knows of no area where men's choices are burdened and women's are not.

[93] 419 U.S. 498, *reh'g denied*, 420 U.S. 966 (1975).

[94] *Id.* at 508 (emphasis in original).

nated against in the military and, therefore, have fewer opportunities. The use of a gender classification here hurts men and does not benefit women. The case presents yet another illustration of the problem with the comparison mode of equal protection review. Since men and women were not "similarly situated" in the first place, the Court could not make the comparison and recognize the discrimination problems created by using a gender-based classification.[95]

Weinberger v. Wiesenfeld[96] and *Stanton v. Stanton*,[97] both decided in 1975, typified easy cases for the Court under the comparison mode. The male plaintiff in *Wiesenfeld* challenged a statute under which he was denied social security survivors' benefits when his wife died. A woman under the same statute would have received such benefits on the death of her husband. In *Stanton*, the defendant challenged a state statute that provided different ages of majority, eighteen years for women and twenty-one years for men. The Court struck both statutes as unconstitutional.

The question of whether it was a man or a woman being discriminated against troubled the Court in *Wiesenfeld*. While resolved to the Court's satisfaction in this particular case,[98] the issue of who is the object of discrimination and how that issue should color review recurs in later cases.[99]

The *Stanton* case presented much language on archaic notions about women's place.[100] The case also presents the first indication of the Court's recognition of another level of equal protection review, termed "something in between." The Court concluded "that under any test—compelling state interest, or rational basis, or something in between—[the challenged section] . . . does not survive an equal protection attack."[101]

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[95] The discriminatory result reached in *Schlesinger* was dictated by the comparison mode of equal protection review. The Court's starting point for analysis was to assume the legal legitimacy of historical discrimination against women in the military. To continue this traditional analysis, which proceeds from the assumption that the men and women being compared are similarly situated, is to require the Court to reach results that perpetuate the discrimination. *See infra* text accompanying notes 124-25.

[96] 420 U.S. 636 (1975).

[97] 421 U.S. 7 (1975).

[98] The majority found comfort in the fact that working women were receiving less protection for their families than working men under the statutory scheme. Weinberger v. Wiesenfeld, 420 U.S. at 645.

[99] *See infra* text accompanying note 179.

[100] 421 U.S. at 10.

[101] *Id.* at 17.

Craig v. Boren[102] represented the culmination of the Supreme Court's struggle to find a standard of review within the equal protection framework for sex discrimination cases. The case involved the important social question of whether a statute allowing boys, aged twenty-one, to buy 3.2 beer was constitutional when girls were permitted to buy 3.2 beer at age eighteen. In its opinion, the Court recognized the "something in between"[103] level of scrutiny that some commentators had been urging.[104] The Court said that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[105]

By choosing a different standard of scrutiny for sex discrimination, the Court was implicitly agreeing that sex discrimination is a less egregious social ill than race discrimination. Strict scrutiny is the standard of review in race discrimination cases, while a lesser standard of review is applied in sex discrimination cases. This implicit belittling of the harm of sex discrimination perpetuates sex discriminatory attitudes.[106]

The stereotyping of women into dependent roles,[107] the stereotyping of fathers as having minimal involvement with their children,[108] the right of women to control their destiny,[109] the role of pregnant women in the work force,[110] the economic disadvantaging of women in the work force,[111] and discrimination against women in the military[112] present a litany of real grievances about the

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[102] 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977).

[103] *See supra* text accompanying note 101.

[104] *See, e.g.*, Gunther, *supra* note 61.

[105] Craig v. Boren, 429 U.S. at 197.

[106] The notion that sex discrimination is implicitly less serious than race discrimination is a widely held belief. I used to think this too. In a class discussion comparing sex and race discrimination, I once commented that no one had ever died as a result of sex discrimination, whereas many blacks have been persecuted by Southern lynch mobs operating out of racial hatred. One student raised her hand and asked, "What about all the women who have died seeking abortions that could not be performed legally and safely?" By failing to see such social problems as sex discrimination issues we remain unable to recognize the seriousness of sex discrimination.

[107] Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

[108] Stanley v. Illinois, 405 U.S. 645 (1972).

[109] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

[110] Geldulding v. Aiello, 417 U.S. 484 (1974); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[111] Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

[112] Schlesinger v. Ballard, 419 U.S. 498 (1975).

role assigned to women in this culture. However, when translated into legal language these claims become a battleground of due process versus equal protection, strict scrutiny versus reasonable basis, penumbras of the Bill of Rights, and a questioning of the very existence of sex discrimination. The abstraction of these very real social problems into this legal vocabulary has diverted attention from the immediate goal of combating sex discrimination. While the standard of review for sex discriminaton was crystallized by *Craig v. Boren*, little else was illuminated.

III

CASES JUSTIFYING GENDER CLASSIFICATIONS

Following the articulation in *Craig v. Boren* of the equal protection standard of review for sex discrimination cases, the Court issued a series of decisions upholding sex-based statutory classifications which perpetuate gender inequality. The cases cover a range of important areas: receipt of government benefits,[113] education,[114] family law,[115] employment,[116] criminal law,[117] and military service.[118]

While the Court's reasons for upholding sex-based classifications vary on a case-by-case basis, the justifications are reminiscent of familiar themes. Historically, the notions that women had a special social role to play and that women were biologically different from men were used to justify sex discrimination.[119] In the Court's recent cases upholding gender-based classifications, these old justifications for sex discrimination are transformed into modern garb.

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[113] Califano v. Webster, 430 U.S. 313 (1977).

[114] Vorchheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977). The *Vorchheimer* case involved the constitutionality of sex-segregated public high schools. The lower court upheld the sex-segregated school system, Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), and the Supreme Court affirmed per curiam by an equally divided Court. 430 U.S. 703 (1977) (Justice Rehnquist took no part in the consideration or decision of this case).

Because decisions made by an equally divided Court do not have precedential value, *see*, *e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73 n.8, (1977), *Vorchheimer* is not discussed in full in this Part. For a discussion of the area of education, see the analysis of Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), at *infra* text accompanying note 183.

[115] Parham v. Hughes, 441 U.S. 347 (1979).

[116] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

[117] Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

[118] Rostker v. Goldberg, 453 U.S. 57 (1981).

[119] *See supra* text accompanying notes 30-50.

The Court continues to uphold disparate treatment of women by referring to the past history of discrimination against women: Women as a group may be treated specially to compensate for the legal disadvantage women once suffered. Now it is culturally acceptable to recognize women as playing the role of the victim of past discrimination. This "special role," however, is used by the Court as part of the new ideology of sex discrimination to justify the continuation of that discrimination.[120]

The argument that women and men are biologically different has also been transformed into a twentieth-century version. First it is determined that women and men are culturally different and, therefore, not similarly situated. The fact that they are not similarly situated for purposes of equal protection review is then used to justify the continuation of sex-based classifications that promote the continuation of those very gender-based cultural differences. The rationalizations presented by the Court for upholding the sex-based classifications described in this Part illustrate the sex discriminatory attitudes that underlie the comparison mode of equal protection review.

Califano v. Webster[121] concerned computation of benefits under the Social Security Act which allowed a wage earner to exclude certain years of income from the benefit calculation. Women were allowed to exclude more years than men, resulting in higher monthly benefits being paid to the retired female wage-earner than to the retired male wage-earner. The Court upheld this differential calculation, holding that the statute met the *Craig v. Boren* standard of serving an important governmental objective, and was substantially related to achieving that objective.[122] In a per curiam opinion, the Court wrote that the differing treatment was a deliberate legislative act designed to compensate women for economic disabilities suffered by them in the work force.[123]

Although the decision benefits women, it nonetheless perpetuates sex discrimination. By the use of the comparison mode, comparing working women to working men, the decision validates the notion that sex discrimination can be ended by using this comparison methodology. One can argue that the comparison mode does work sometimes, as here, in serving to redress economic differ-

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[120] *See infra* text accompanying notes 121-25.

[121] 430 U.S. 313 (1977).

[122] *Id.* at 317-21.

[123] *Id.* at 320.

ences between women and men.[124] However, a standard measuring need, rather than gender, could easily have been used instead, since data on earnings was part of the computation process.[125] By using a gender-based classification where it was unnecessary the Court only perpetuated sex discrimination.

In *Parham v. Hughes*,[126] plaintiff challenged a Georgia statute that permitted the mother of an illegitimate child, or a father who had legitimated the child, to bring a wrongful death suit. The statute precluded a father who had not legitimated the child from suing for the child's wrongful death. The Supreme Court found that the statute did not violate the equal protection clause. Justice Stewart, writing for the Court, began his analysis with a reminder that "[s]tate laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause,"[127] but that not all state laws are "entitled to the same presumption of validity."[128] Justice Stewart cited race as the paradigmatic example of a suspect classification and acknowledged that the presumption of statutory validity "may also be undermined"[129] when classes are based on other immutable traits, such as national origin, alienage, illegitimacy and gender. His analysis continues the theme that sex discrimination is less important than race discrimination, a theme which was set forth in *Craig v. Boren* and implicit in the Court's continuing refusal to recognize sex as a suspect classification.

Justice Stewart also found that "invidious" discrimination must be present to trigger equal protection review.[130] He found no invidious discrimination based on illegitimacy or sex. "In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity."[131] Justice Stewart argued that mothers and fathers of illegitimate children are not "similarly situated," since only fathers can legitimate chil-

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[124] Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978). For a contrary view, see Gertner, Bakke *on Affirmative Action for Women: Pedestal or Cage?* 14 HARV. C.R.-C.L. L. REV. 173 (1979).

[125] A similar argument was made by Justice Brennan, dissenting, in Kahn v. Shevin, 416 U.S. 351, 360 (1974).

[126] 441 U.S. 347 (1979).

[127] *Id.* at 351.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 354.

dren; thus, the difference in statutory treatment is not based on generalizations about men as a class.

This analysis again illustrates the poverty of the comparison mode. The Court must perceive women and men to be similarly situated for this kind of equal protection review to be triggered. Here, the Court finds differences in their situations. However, socially created differences exist in the situations of men and women because, as a result of centuries of discrimination, the social reality of women and men is different. This is the very discrimination about which the Court purports to be so concerned. Dissimilar situations of women and men are the norm, and will continue to be the norm, as long as the comparative mode requires that men and women be similarly situated before a constitutional challenge will be sustained.[132]

Using a *Craig v. Boren* approach, Justice Powell argued in his concurrence that the gender-based distinction challenged in *Parham* was substantially related to the important state objective of avoiding the problems of proving paternity in wrongful death suits.[133] This kind of reasoning supporting the sex-based classification is more subtle in its perpetuation of the discrimination. It has the ring of lawyerly thinking because it uses the Court's equal protection vocabulary; however, the Court stresses the wrong balance of factors in that vocabulary. Equality of men and women has been implicitly viewed as less important than the state's interest in administering its legal system as easily as possible.[134]

Unlike many earlier cases that did not have a major practical impact on women's rights, *Personnel Administrator of Massachusetts v. Feeney*,[135] involving hiring preference granted to veterans in civil service,[136] was a very important sex discrimination case with troubling implications for women. The veterans' preference was written on the face of the statute in sex neutral language, but the plaintiff argued that the preference discriminated against women because it had a severely disproportionate impact upon wo-

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[132] Dissenting, Justice White, joined by Justices Brennan, Marshall, and Blackmun, criticized the "startling circularity" of the majority's analysis. *Id.* at 361.

[133] *Id.* at 360-61 (Powell, J., concurring).

[134] See *infra* Part VI, which describes a series of rules for a better balancing of factors in sex discrimination cases.

[135] 442 U.S. 256 (1979).

[136] *Id.* at 261 ("The Federal Government and virtually all of the States grant some sort of hiring preference to veterans.").

men's job opportunities.[137]

The Court acknowledged that "the statute today benefits an overwhelmingly male class,"[138] and yet found that there was no discriminatory purpose behind the statute.[139] The Court stated: "Just as there are cases in which impact alone can unmask an invidious classification, . . . there are others, in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed. This is one."[140] Reminiscent of the Court's "I know it when I see it" language in the pornography case, *Jacobellis v. Ohio*,[141] the Court here is suggesting that a non-discriminatory disproportionate impact can also be easily spotted by the

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[137] The plaintiff's own employment history provided a stunning example of this disproportionate impact:

> [The appellee] first entered the state civil service system in 1963, having competed successfully for a position as Senior Clerk Stenographer in the Massachusetts Civil Defense Agency. There she worked for four years. In 1967, she was promoted to the position of Federal Funds and Personnel Coordinator in the same agency. The agency, and with it her job, was eliminated in 1975.
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> During her 12-year tenure as a public employee, Ms. Feeney took and passed a number of open competitive civil service examinations. On several she did quite well, receiving in 1971 the second highest score on an examination for a job with the Board of Dental Examiners, and in 1973 the third highest on a test for an Administrative Assistant position with a mental health center. Her high scores, however, did not win her a place on the certified eligible list. Because of the veterans' preference, she was ranked sixth behind five male veterans on the Dental Examiner list. She was not certified, and a lower scoring veteran was eventually appointed. On the 1973 examination, she was placed in a position on the list behind 12 male veterans, 11 of whom had lower scores. Following the other examinations that she took, her name was similarly ranked below those of veterans who had achieved passing grades.
>
> Ms. Feeney's interest in securing a better job in state government did not wane. Having been consistently eclipsed by veterans, however, she eventually concluded that further competition for civil service positions of interest to veterans would be futile. In 1975, shortly after her civil defense job was abolished, she commenced this litigation.

Id. at 264-65.

[138] *Id.* at 269.

[139] Equal protection disparate impact claims require a showing of discriminatory legislative intent. Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law . . . , without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has racially disproportionate impact.").

Further, a discriminatory purpose may be allowable if it is not the only purpose. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

[140] Personnel Adm'r of Mass. v. Feeney, 442 U.S. at 275 (citations omitted).

[141] 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

judge. Here, the mystique of the justice's role is swept aside and the naked power is revealed.[142] The injection of the discriminatory purpose requirement into equal protection jurisprudence provides the Court with another justification for maintaining a status quo of discrimination.

Michael M. v. Superior Court of Sonoma County,[143] a case involving California's statutory rape law criminalizing only conduct by males, also illustrates the inability of a judiciary using the comparison mode of analysis to end sex discrimination. The Court wrote that the equal protection clause did not " 'demand that a statute necessarily apply equally to all persons' or require ' "things which are different in fact . . . to be treated in law as though they were the same." ' "[144]

By emphasizing a process which compares women to men, and discovering that the two are different, the Court's interpretation of the equal protection clause clearly points out the problem with the comparison mode. That women and men are different should come as no great surprise. The problem in equal protection terms is the perpetuation of constitutionally impermissible disparate treatment of men and women. To say that since men and women are different they may be treated differently ignores the very notion of equality of rights under law that the fourteenth amendment protects. The comparison mode, insofar as it urges the Court to find that men and women are similar before finding a constitutional violation, perverts the notion of equal justice.

In *Michael M.*, Justice Rehnquist concluded:

> In upholding the California statute we also recognize that this is not a case where a statute is being challenged on the grounds that it 'invidiously discriminates' against females. To the contrary, the statute places a burden on males which is not shared by females. But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts.[145]

By writing into the majority opinion his view that disparate treatment of men does not contravene the equal protection clause, Jus-

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[142] It is neither pornography nor a discriminatory purpose because he says so. "He" is used intentionally here because the judiciary remains overwhelmingly male. Who a judge is affects his or her assessment of discriminatory purpose.

[143] 450 U.S. 464 (1981).

[144] *Id.* at 469 (quoting Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)).

[145] *Id.* at 475-76.

tice Rehnquist validated the belief he expressed previously in his dissent to *Craig v. Boren*.[146] In that dissent, Justice Rehnquist dismissed the idea that discrimination against men might "redound to the detriment of females, because they tend to reinforce 'old notions' restricting the roles and opportunities of women."[147] He emphasized that discrimination against men hardly counts for constitutional purposes.

The importance attached to the gender of the victim raises a particularly insidious side effect of the comparison mode of equal protection review. If the first question is who is the plaintiff—male or female—and the case result flows from the answer, then the idea of equal justice under law seems hypocritical. The goal of ending sex discrimination may benefit females more than males to the extent that women have been treated unfairly more often and in more ways than men. However, ending sex discrimination should not offer women special protection not also offered to men. Justice Rehnquist's belief that women need protection is just a twentieth-century version of chivalry, complete with the pedestal which continues to be a cage.[148]

In *Rostker v. Goldberg*[149] the Court held that the Military Selective Services Act, authorizing registration of males, but not females, for possible conscription, does not violate the constitutional guarantee of equal protection of the laws.[150] In justifying this conclusion, Justice Rehnquist said, "Congress was fully aware not merely of the many facts and figures presented to it by witnesses who testified before its Committees, but of the *current thinking as to the place of women in the Armed Services*."[151] To justify the holding, the Court cites, as a matter of constitutional review, to the legislative political process which led to the sex discriminatory result.[152] This kind of reasoning ignores the role of the Court as

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[146] 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).

[147] *Id.* at 220 n.2.

[148] *Compare* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) ("Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."), *with* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971) ("The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.").

[149] 453 U.S. 57 (1981).

[150] *See supra* note 3.

[151] Rostker v. Goldberg, 453 U.S. at 71 (emphasis added).

[152] The Court also implicitly cites public opinion as it was reflected in the legislative judgment concerning the propriety of allowing women to participate fully in the armed forces. Public opinion is the ideological antithesis of an appropriate standard

the protector of "discrete and insular minorities"[153] who might not be adequately represented by that political process.

The Court cites this refusal by the legislative branch to extend the Act to include registration by women as evidence that the decision was not an "accidental by-product of a traditional way of thinking about females."[154] It is convoluted reasoning, at best, to assert that the decision is any less the by-product of traditional thinking about women because the choice is made with legislative purpose rather than by accident. The danger behind this kind of judicial reasoning is that the traditional sex discriminatory ways of thinking about women, which remain at the root of the decision-making process, will be upheld with the cloak of judicial approval.

The mosaic of equal protection vocabulary developed in this series of cases upholding sex-based classifications is chilling to any advocate of full societal participation. The hope generated by *Reed* and *Frontiero* that the Court would redress claims of sex discrimination has not become a reality in our society, where women may not be drafted, yet jobs are awarded based on a preference to veterans, where only women receive the protection of rape laws, and where an uninvolved male role in the family is legitimized. The comparison mode of equality has been used to perpetuate existing differences between the treatment of women and men. The language developed in these cases will continue to be used to perpetuate and justify this denial of full participation in the future.

IV

CASES STRIKING SEX-BASED CLASSIFICATIONS

Since the appropriate standard of scrutiny in sex discrimination equal protection claims was formulated in *Craig v. Boren*,[155] the Court has considered seven cases in which gender-based legislative classifications were struck down.[156] An observer might com-

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for judicial review. The Court was being remarkably candid about the degree to which its decisions may be influenced by public opinion.

[153] *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980).

[154] Rostker v. Goldberg, 453 U.S. at 74 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977), quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)).

[155] *See supra* text accompanying note 105.

[156] Califano v. Goldfarb, 430 U.S. 199 (1977); Orr v. Orr, 440 U.S. 268 (1979);

ment that the Court will uphold sex-based classifications when they are substantially related to important legislative purposes; but when they are not so related to the legislative purposes, the Court will combat sex discrimination by striking the gender classifications. This message, that the legal system is working to fight discrimination, is an important part of the ideology of equality. However, a closer examination of these cases in which the Court has struck down gender classifications reveals that they too perpetuate sex discrimination, or, at least, that they are not effectively combating it.[157]

Initially, it is hardest to see how a group of cases which have struck down sex-based classifications can perpetuate sex discrimination. It would seem that the Court's act in declaring these particular gender-based legislative classifications unconstitutional is directed toward eradicating sex discrimination itself. In fact, the cases do contain some strong language indicating the Court's desire to end sex discrimination.[158]

However, close study of the method of analysis and the substantive decisions of the cases reveals that these opinions complement

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Caban v. Mohammed, 441 U.S. 380 (1979); Califano v. Westcott, 443 U.S. 76 (1979); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Kirchberg v. Feenstra, 450 U.S. 455 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[157] Of course, some social good comes from these decisions because they do combat sex discrimination by the very fact that they strike gender-based classifications. The criticism in this Part, however, is aimed at the broader jurisprudential picture to illustrate how the Court's decisions, on balance, are serving to perpetuate the status quo of sex discrimination.

[158] *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. at 724-25 ("[T]he test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. . . . Thus if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); Califano v. Westcott, 443 U.S. at 89 ("[This gender classification is] part of the 'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials', while the mother is the 'center of home and family life.' Legislation that rests on such presumptions . . . cannot survive scrutiny under the Due Process Clause of the Fifth Amendment." (citations omitted)); Caban v. Mohammed, 441 U.S. at 403-04 n.6 (Stevens, J., dissenting) ("Habit . . . makes it seem acceptable . . . to distinguish between male and female . . .; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.") (quoting Mathews v. Lucas, 427 U.S. 495, 520-21 (1976)(Stevens, J., dissenting)); Orr v. Orr, 440 U.S. at 283 ("Where . . . the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.").

the line of cases legitimating sex discrimination that were discussed in the last section. The most obvious way in which these cases perpetuate sex discrimination is by their adoption of the comparison mode of analysis,[159] which encourages a viewpoint of the issues that ignores the real problem of sex discrimination. The discrimination is further perpetuated by a doctrinal confusion in the opinions about who is harmed by sex discrimination. The cases contain some troubling language and ultimately benefit male victims of discrimination more than female victims.

In each of these cases a statutory gender classification enabled the Court to compare the treatment of women and men under the legislative scheme. Three cases involved disparate payment of statutory benefits which the Court found unconstitutional—*Califano v. Goldfarb* (OASDI),[160] *Califano v. Westcott* (AFDC),[161] and *Wengler v. Druggists Mutual Insurance Co.* (workers' compensation).[162] Three cases dealt with state statutory schemes relating to family law which the Court struck down—*Orr v. Orr* (male-only alimony statute),[163] *Caban v. Mohammed* (unwed father could not block adoption),[164] and *Kirchberg v. Feenstra* (exclusive management and control of community property by husband).[165] The final case, *Mississippi University for Women v. Hogan*,[166] involved a challenge to a state funded, women's only, graduate school in nursing.

In each of these cases the Court's requirement that women and men be similarly situated for the purpose of an equal protection review was easily met.[167] Men and women both sought government benefits, men and women were both subjected to state family laws, and a man sought entry to a graduate program in which women were admitted.

Even with the easily available comparison between women and men, the Court's decisions were not unanimous,[168] nor was the

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[159] *See supra* text accompanying notes 7-11.

[160] 430 U.S. 199 (1977).

[161] 443 U.S. 76 (1979).

[162] 446 U.S. 142 (1980).

[163] 440 U.S. 268 (1979).

[164] 441 U.S. 380 (1979).

[165] 450 U.S. 455 (1981).

[166] 458 U.S. 718 (1982).

[167] For contrast, see Rostker v. Goldberg, 453 U.S. 57, 79 (1981); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981). *See also supra* text accompanying notes 130-31.

[168] Three separate opinions were filed in *Califano v. Goldfarb*; five in *Orr v. Orr*;

method of analysis used in the opinions always simple. In *Westcott*, the Court debated whether the classification was gender-based.[169] In *Goldfarb*, *Orr*, and *Wengler* the Court continued the debate concerning who was being discriminated against, women or men.[170]

By applying the *Craig v. Boren* standard and asking whether the challenged gender discriminations are substantially related to important government objectives, the cases also perpetuate sex discrimination. The *Craig* standard remains a watered-down form of equal protection review and does not present a strong statement about the importance of ending sex discrimination. In *Hogan*, a most recent sex discrimination decision, the Court again declined to decide whether classifications based on gender are "inherently suspect."[171] The Court's continued stance, refusing to recognize the importance of sex-based discrimination in terms of the comparison mode of equal protection review, reinforces the notion that sex discrimination is a mere tempest in a teapot that can be adequately treated by a tepid standard of review. An even stricter standard of equal protection review, if still utilizing the comparison mode, would not effectively end sex discrimination.

There is language in each of these cases that could be used to perpetuate sex discrimination. The Court in *Goldfarb*, describing *Frontiero v. Richardson*, wrote that "differential treatment . . . for the *sole* purpose of achieving administrative convenience" was unconstitutional.[172] Apparently if it is not the sole purpose, but only part of a purpose, administrative convenience may justify a gender-based classification. To suggest that sex discrimination will be allowed in instances where discrimination is administratively convenient does not present a very strong argument that sex discrimination is unacceptable.

There is also some troubling language in *Orr*. There, the Court considered "whether women had in fact been significantly discriminated against *in the sphere* to which the statute applied a sex-based classification, leaving the sexes *'not* similarly situated with

three in *Caban v. Mohammed*; two in *Califano v. Westcott*; three in *Wengler v. Druggists Mut. Insur. Co.*; two in *Kirchberg v. Feenstra*; and four in *Mississippi Univ. for Women v. Hogan*.

[169] Califano v. Westcott, 443 U.S. at 83-84.

[170] Wengler v. Druggists Mut. Insur. Co., 446 U.S. at 147; Orr v. Orr, 440 U.S. at 281-82; Califano v. Goldfarb, 430 U.S. at 208-09.

[171] 458 U.S. at 724 n.9.

[172] 430 U.S. at 205 (emphasis added).

respect to opportunities' in that sphere."[173] Justice Blackmun noted the problem with this language, and concurred in the result only "[o]n the assumption . . . [that the above language] does not imply that society-wide discrimination is always irrelevant."[174] Justice Blackmun correctly perceived that the extension of the troublesome "similarly situated" requirement to particular spheres of discrimination, and the elimination from consideration of society-wide discrimination, would make the comparison mode standard of review much too narrow.

In fact, the substantive decisions in these cases are themselves rather narrow and have only a limited impact. *Wengler* involved a type of worker's compensation statute that had been struck down in three other jurisdictions which had considered similar statutes, and that was no longer widespread.[175] The statute in *Kirchberg* had already been repealed by the time that case was argued.[176] The single-sex institution of higher education in *Hogan* was one of only two such sex-segregated, state funded institutions in the nation.[177] The Court in *Hogan* went to great lengths to ensure that the issue presented was "narrow" and that the decision was viewed as having a limited impact.[178] The Court also declined to address whether the Mississippi University for Women's admission policy "as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment."[179]

There is much discussion in these cases as to whether the discrimination at issue hurt men or women. The majority opinions in the government benefit cases adopted the view that women are hurt because they are able to earn less protection for their families than working men.[180] In this sense, working women were discriminated against by the rules that the Court struck down. However, in instances where women were economically hurt, as in *Feeney*,[181] or barred from participation in society, as in *Rostker*,[182]

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[173] Orr v. Orr. 440 U.S. at 281 (first emphasis added).

[174] *Id.* at 284 (Blackmun, J., concurring).

[175] 446 U.S. at 147 n.3.

[176] 450 U.S. at 457 n.1.

[177] Greenhouse, *Court Says School Cannot Bar Men*, N.Y. Times, July 2, 1982, at A1, col. 1.

[178] 458 U.S. at 719.

[179] *Id.* at 723, n.7.

[180] Wengler v. Druggists Mut. Insur. Co., 446 U.S. at 147; Califano v. Goldfarb, 430 U.S. at 206-07. *See also* Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

[181] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

[182] Rostker v. Goldberg, 453 U.S. 57 (1981).

and where men did not also benefit from the striking of the gender-based rules, those sex discriminatory classifications were upheld.

Ironically, most cases in which the Court has combated sex discrimination by striking down gender-based classifications have involved discrimination against men. As a result of the decision in *Califano v. Goldfarb*, a man could now get AFDC survivor benefits; in *Caban*, a father of an illegitimate child could now block an adoption; in *Orr*, men have won the right to receive alimony from women; in *Wengler*, a man became entitled to receive workers compensation death benefits when his spouse died; and in *Hogan*, a man could attend a previously all female graduate nursing program.[183]

Thus, a majority of the cases striking sex-based classifications involved rectifying discrimination against men. These cases did present examples of men who were hurt because of sex discrimination. To the extent one can infer from the decisions that women are capable of economic self-sufficiency, the Court is combating sex discrimination against women. However, the main thrust of this line of decisions is not ending sex discrimination against women, but rather ending the harm of discrimination as it hurts male plaintiffs.[184]

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[183] The combination of Vorchheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977), and *Hogan* present women with the worst of all worlds. The divided opinion in *Vorchheimer* upheld a male-only institution, reasoning that single-sex schools were beneficial to each sex. Then *Hogan* found unconstitutional a women-only institution which served to keep men out and provide women the haven which *Vorchheimer* advocated. The sum total is that while women could be kept out of all-male institutions, men could not be kept out of all-female institutions.

To the extent that nursing is stereotyped as a female-only occupation, the integration of men into a women-only nursing school is certainly a positive step toward ending discrimination. But it is interesting to note that the Court took that step when the complainant was a man who was denied access to education, rather than a woman, as was the case in *Vorchheimer*.

[184] In Kirchberg v. Feenstra, 450 U.S. 455 (1981), the Court struck down a community property law that gave husbands the exclusive right to management and control of the community property. This ruling does not benefit individual men who might wish to retain that control, but it does benefit a patriarchal capitalist economic system, such as ours, by promoting the flow of capital. *Kirchberg* benefits women by giving them control of their community property, in addition to benefiting the capitalist economy.

For another example of this theory that the Court may act in a way that benefits the victims of discrimination when there are other societal benefits, see Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). This article describes the economic and political advantages for whites in

In *Califano v. Westcott*, the Court evaluated and struck down a legislative classification which disbursed welfare benefits to families with unemployed fathers, but not to families with unemployed mothers. Needy children are the clearest beneficiaries of this action by the Court, followed by the parents, which in most instances include both a father and mother. Again, the substantive beneficiaries of the Court's action in striking the sex-based classification were not primarily women, the group most victimized by sex discrimination.

The debate about whether it is men or women who are hurt by discrimination perpetuates the discrimination itself. It confuses the issue as to who is the victim of sex discrimination. While it is true that men are hurt by sex discriminatory attitudes, the overwhelming evidence is that women are the real victims of sex discrimination. Ending this victimization against women is the impetus behind concern about sex discrimination, just as ending discrimination against blacks, rather than against whites, is the impetus behind concern about race discrimination.[185] However, the lack of attention by the Court to the fact that women are the real victims of sex discrimination enables the Court to preserve the existing ideology of equality without making any significant changes in the status quo of sex discrimination. The ideology of equality in its modern garb presents the message that women and men must be treated alike, and the Court is purporting to show its inclination to do so by striking sex-based classifications. In fact, however, the sex discrimination which the Court is addressing has operated primarily to the detriment of men. The Court is not assertively combating sex discrimination against women. The striking of sex-based classifications in these cases legitimates the status quo of discrimination against women by creating the illusion that the Court is addressing the issue of sex discrimination and remedying those instances of discrimination that are particularly egregious.

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ending segregation in the post-World War II period. *See generally* D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980).

[185] Whites and men, as well as blacks and women, will ultimately benefit by an end to race and sex discrimination.

V

SEX DISCRIMINATION CASES ANALYZED ON OTHER GROUNDS

The Supreme Court abortion decisions[186] legitimize sex discrimination in several ways. The method of analysis used to decide these questions, the language used by the Court in the opinions, the pattern of decisions that have evolved on both sides of the question, and the substantive holdings in many of the cases have adversely affected women's access to reproductive freedom.

Probably no single issue more seriously impacts the rights of women than the question of access to reproductive freedom. If a woman cannot control the decision whether or not to bear a child or to be sterilized, then she has no meaningful opportunity to participate in society. Sex discrimination is perpetuated and legitimated by the denial of this control to women.

The abortion cases have been argued and decided in the constitutional terms of denial of a right to privacy. They have not been litigated and decided as equal protection cases.[187] The failure to see this issue of access to reproductive freedom as involving the potential denial of equality of rights under law reveals a serious problem about contemporary equality theory. The Court has not conceptualized the reproductive freedom issue as an equality issue, undoubtedly because of the poverty of the comparison mode. Since men cannot biologically bear children, they do not suffer the same denial of access to reproductive rights as women. Here again the biological difference between women and men, in a soci-

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[186] Roe v. Wade, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973); Doe v. Bolton, 410 U.S. 179, *reh'g denied*, 410 U.S. 959 (1973); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519, *reh'g denied*, 434 U.S. 880 (1977); Bellotti v. Baird, 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979); Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980); H.L. v. Matheson, 450 U.S. 398 (1981); City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 103 S. Ct. 2517 (1983); Simopoulos v. Virginia, 103 S. Ct. 2532 (1983).

[187] Some of the early abortion cases were argued in equal protection language, but the discriminatory classification at issue was race, wealth, or age, not gender. *See* Brief for Appellant at 46-50, Doe v. Bolton, 410 U.S. 179 (1973); Brief for Appellant at 50-61, Planned Parenthood Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Brief for Appellee at 15-20, Maher v. Roe, 432 U.S. 464 (1977); Brief for Respondent at 45-54, Poelker v. Doe, 432 U.S. 519 (1977); Brief for Appellee at 32-35, Bellotti v. Baird, 443 U.S. 622 (1979).

ety where the model for comparison is men, results in an inability to perceive the issue as one of sex discrimination.

The right to abortion should be grounded constitutionally in the fourteenth amendment rather than in a penumbral privacy right. The basis of the decision is critical because the strength of the right is determined by its source. The right of equality and freedom from sex discrimination implicit in reproductive autonomy is diluted when grounded in privacy. It is diminished when discussed along with other interests that are involved in the abortion decision, such as a doctor's right to make decisions about a patient,[188] or a state's concern about spending,[189] or a parent's interest in the abortion decision.[190] These other interests are important, but subordinate to the end of eliminating sex discrimination. The legitimating of other interests and the failure to recognize these other interests as subordinate diminishes the importance of women's interest in reproductive freedom.[191] Basing the right of access to reproductive freedom in the fourteenth amendment's promise of equality of rights is a stronger statement that this right is paramount to ending sex discrimination. Equality of rights is possible only when women are assured the opportunity of full social participation. Reproductive autonomy is necessary to that full participation.

The Court's language in these decisions reveals the Court's lack of awareness of the reality of the abortion decision to the group of people who must make that decision, *i.e.*, women. The Court made clear in *Roe v. Wade* that the divergence of views of women were not in the forefront of concern when they stated, "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, *even among physicians* . . . ."[192] The Court also falls into the trap provided by the English language of discussing the abor-

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[188] Roe v. Wade, 410 U.S. at 163; Doe v. Bolton, 410 U.S. at 192.

[189] Maher v. Roe, 432 U.S. at 479.

[190] H.L. v. Matheson, 450 U.S. at 411; Bellotti v. Baird, 443 U.S. at 640.

[191] The Court was very candid in its rejection of a right to reproductive freedom:

> The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.

Roe v. Wade, 410 U.S. at 154.

[192] *Id.* at 116 (emphasis added).

tion question in terms of male gender: "[W]e have inquired into . . . medical and medical-legal history and what that history reveals about *man's* attitudes toward the abortion procedure over the centuries."[193] Although current English usage allows the use of the word "man" to include women, it is curious that the Court declined to mention women specifically in a discussion of a decision pertaining to women's physiology. To the extent that language does affect the way that we perceive the world,[194] this judicial failure to include women exacerbates the problem that the right to reproductive freedom is not seen as an issue largely bearing on women's freedom.

The abortion cases decided by the Supreme Court reveal an interesting, albeit usual, pattern in which decisions are made that establish lines of cases as precedent for and against reproductive freedom issues. The first cases, *Roe v. Wade* and *Doe v. Bolton*, established a woman's right to privacy as to the abortion decision. Although it was a begrudged right,[195] the decision did afford a measure of reproductive freedom to women. In *Beal v. Doe*[196] and *Maher v. Roe*,[197] a state interest in support of childbirth was manufactured out of whole cloth, thereby establishing support for conflicting sides of the reproductive rights question.

A similar pattern is evidenced concerning the question of parental consent to abortion. In *Planned Parenthood of Central Missouri v. Danforth*,[198] the Court held that parents could not have a blanket, unreviewable power to veto the abortion decision. In *H.L. v. Matheson*[199] a parental notice statute was upheld. Thus, in the area of parental consent, cases can now be cited in support of both sides of opposing views. This process of law which establishes two separate lines of cases, rather than a jurisprudence focused upon a consistent stance, perpetuates sex discrimination. If the eradication of sex discrimination were prioritized, then the de-

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[193] *Id.* at 116-17 (emphasis added).

[194] Language influences how we think about the world. For example, if lawyers are always referred to as "him," we think of lawyers as male. If nurses are always "she," we think of nursing as a female profession. *See* WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY (S. McConnell-Ginet ed. 1980).

[195] "[T]he right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154.

[196] 432 U.S. at 445-46.

[197] 432 U.S. at 478.

[198] 428 U.S. at 74.

[199] 450 U.S. 398 (1981).

lineation of factors that would lead to that eradication would be simplified.

Women's right to reproductive freedom is objectified by these Court decisions. The right has been characterized as one of many factors which the Court must balance, and has been viewed as an issue removed from the body of the woman who must make the decision. The Court's discussions make irrelevant the agony of women faced with the decision to undergo an abortion. The separation of the Court's opinions from the very real human anguish involved ignores an important social reality in women's lives.

VI

ENDING SEX DISCRIMINATION: A PARTICIPATORY PERSPECTIVE

Sex discrimination, like race discrimination, is a part of the society in which we live. Discriminatory acts are often done unconsciously because certain patterns of behavior are such an integral part of our social structure that we do not immediately perceive them as discriminatory. Sex discrimination exists in all social arenas. It is present in the area of home life, which is usually designated as the "private" sphere and somewhat insulated from legal intervention; and it exists in the "public" sphere in both the workplace and in the field of education, which determines an individual's ability to gain access to that work.

To survivors of the rebirth of the feminist movement in the 1960's, these ideas are not new. What has become clouded in the public mind is the fact that it is women and girls, not men and boys, who are the primary victims of this pervasive societal discrimination. Women earn $0.59 for every dollar earned by men (and minority women earn less); women receive little if any support in the work force for pregnancy and child rearing (a role usually assigned to them by the so-called "private" sphere); women have uncompensated work at home that makes their true work week (paid and unpaid) longer than men's; and women risk their lives daily to terminate unwanted or unaffordable pregnancies when the means for legal and safe abortion is denied to them.

Women, not men, are the victims of sex discrimination, just as blacks and not whites are the victims of race discrimination. Of course, men may be discriminated against on the basis of sex. A man who wants a leave from work to raise children will be viewed as odd; a man who wants to work in a "woman's job" like nursing

will be looked at askance. Similarly, whites suffer from race discrimination. White students who attend segregated schools miss out on important educational opportunities. However, in the area of race discrimination, it is clear to most observers of this nation's history that blacks are the victims of race discrimination. That clarity of vision has been obscured in the area of sex discrimination.

The comparison mode of equal protection theory perpetuates sex discrimination. The comparison mode allows the Court to maintain an ambivalent attitude toward ending sex discrimination that reflects the ambivalence in society and in our Constitution. If Congress proposed a constitutional amendment[200] or enacted legislation[201] that mandated an end to sex discrimination, the Court would have to be less ambivalent. In the absence of this approach, a philosophy of judicial review which takes seriously the need to protect those unrepresented in the political process[202] could result in a jurisprudence aimed at ensuring full participation in society for all citizens. These events have not occurred, and the possibility of their occurring is affected by society's perception of what equality means and of how the path to ending sex discrimination should be charted. To the extent that the legal system serves to legitimate discrimination, the possibility of empowering women diminishes.

That the law legitimates inequality is a theme of many contemporary legal scholars.[203] However, in the area of sex discrimination a special problem is presented that goes beyond a critique of American jurisprudence and the broken promise of equality. Achievement of equal justice between women and men ultimately requires understanding our differences. In order to derive a jurisprudence that makes an equalization of power relations possible, differences in the present social reality of men and women, as well as biological differences, must be considered.[204]

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[200] *See* Clymer, *Time Runs Out for Proposed Rights Amendment*, N.Y. Times, July 1, 1982, at A12.

[201] Binion, *The ERA: A Job for Congress*, San Francisco Chron., Sept. 26, 1982, § This World, at 19.

[202] *See supra* note 153.

[203] D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON, & C. WINSLOW, ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (1975); Balbus, *supra* note 4; Freeman, *supra* note 29; Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Lawrence, *Segregation "Misunderstood": The* Milliken *Decision Revisited*, 12 U.S.F.L. REV. 15 (1977).

[204] This path is not without dangers. By acknowledging differences, the door is

It is easy to see why the comparison approach to equality is an attractive one. It comports with our societal notions about equality and is part of our national ideology. We do not want "special treatment" and we especially do not want others to receive it. We fear that if we abandon the idea of undifferentiated treatment special classes of people would be created.

The fallacy of this argument lies in the fact that we already have special classes in this society and that the ideology of equality to which we cling comes from statements like Thomas Jefferson's, "All *Men* are created equal." The comparison approach to equality ignores the historical reality that women have been treated differently and disadvantageously throughout this nation's history.[205]

Since the comparison mode of analyzing equality serves only to perpetuate sex discrimination, another approach must be substituted.[206] A participatory perspective, aimed at ensuring full societal participation, would accomplish the goal of eliminating sex discrimination.[207] The fact that women and men are not similarly situated in this culture must be acknowledged as a starting point for any meaningful equal protection review that would end sex discrimination. In the past, the Court has used the biological differences between men and women to justify disadvantaging women. The participatory perspective avoids this oppressive use of biological differences.

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open for judicial emphasis on inequality. *See* Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMAN'S RTS. L. REP. 175 (1982).

[205] For a compelling description of life within patriarchy, see A. RICH, OF WOMAN BORN, (1976). *See also* Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980).

[206] Other interpretations of the equal protection clause are possible, *see* Fiss *supra* note 11, as is a constitutional amendment. While it seems clear that such changes in the legal system are unlikely to be accomplished outside of accompanying turmoil in the political arena, it is still necessary, in trying to bring about those changes, to consider what kind of approach to the fourteenth amendment would in fact serve to promote an end to sex discrimination.

[207] Several commentators have also addressed this question of how to end sex discrimination. *See* Freedman, *The Equal Protection Clause, Title VII and Differences Between Men and Women: A Critical Analysis of Contemporary Sex Discrimination Jurisprudence*, 92 YALE L.J. — (1983) (forthcoming); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. — (1984) (forthcoming); Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Wasserstrom, *supra* note 5; Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487 (1981); MacKinnon, *Toward Feminist Jurisprudence* (Book Review), 34 STAN. L. REV. 703 (1982). *See also* W. CHAFE, WOMEN AND EQUALITY: CHANGING PATTERNS IN AMERICAN CULTURE (1977); E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980).

According to a participatory perspective, the following postulates must be applied in reviewing any sex-based classification:

Rule 1: Avoid sex-based classifications where possible. Classifications that are explicitly sex-based or that have a disparate impact on women are inherently suspicious.

Rule 2: If a classification is unavoidably sex-based, remember that it is women who have been historically discriminated against by sex-based classifications, and that sex-based classifications that are harmful to women are not acceptable.

Rule 3: In determining whether a sex-based classification is harmful to women consider the following:

(a) Does the classification stigmatize women?
(b) Does the classification serve to limit women's choice of social role exclusively to the private sphere?
(c) Does the classification prevent or hinder women from making their own choices about their individual social role?

Rule 4: In determining whether a sex-based classification is desirable, consider the following:

(a) Does the classification provide for greater participation in the public sphere by women?
(b) Does the classification provide greater access to education to women?
(c) Does the classification provide women with greater decision-making power over their own lives?
(d) Does the classification foster the image of women as capable, competent persons?

Critics will be concerned with how this legal interest in women, this prioritization, will end. I suggest we be concerned with whether it will ever start. We need a legislative, social, and judicial commitment to end sex discrimination against women.